No. 05-5986

IN THE SUPREME COURT OF THE UNITED STATES

ERIC MICHAEL CLARK,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

AUG 1 2005

ON PETITION FOR CERTIORARI TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether Arizona's insanity law, as set forth in A.R.S. § 13-502 (1996) and applied in this case, violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment?

(2) Whether Arizona's blanket exclusion of evidence and refusal to consider mental disease or defect to rebut the state's evidence on the element of *mens rea* violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment?

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(1) Arizona's abolition of the "nature and quality of the act" aspect of the *M'Naghten* insanity test violates Petitioner's right to due process by precluding him from exercising a fundamental right recognized at common law. The Arizona Court of Appeals misinterpreted and misapplied this Court's decisions in *Medina v. California*, 505 U.S. 437, 449 (1992) and *Paterson v. New York*, 432 U.S. 197, 201-02 (1977). This Court should grant the writ to address this issue of national importance. 9

A. The Arizona Court of Appeals' decision is contrary to and misinterprets this Court's precedent. 10

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(2) Arizona's refusal to permit the consideration of exculpatory *mens rea* evidence violates due process. The Arizona Court of Appeals decision in this case, that relies upon the Arizona Supreme Court's decision in *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997) is contrary to and misinterprets this Court's decisions in *United States v. Fischer*, 328 U.S. 463 (1946) and *Montana v. Egelhoff*, 518 U.S. 37 (1996) and the majority of federal precedent. This Court should grant the writ to clarify this issue of national importance as a majority of states and federal jurisdictions recognize that *mens rea* evidence is mandated by due process. 24

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Petitioner, Eric Michael Clark ("Clark"), hereby prays that a writ of certiorari issue to review the judgment of the Arizona Court of Appeals as follows.

OPINIONS AND ORDERS BELOW

The memorandum decision of the Arizona Court of Appeals affirming Appellant's conviction and sentence is unpublished. *State v. Clark,* No. 1 CA-CR 03-0851 and 1 CA 03-0985 (consolidated) (Ariz. App, Div. 1, January 25, 2005.) Appendix A. The order of the Arizona Supreme Court denying discretionary review of the decision of the Arizona Court of Appeals is also unpublished. *State v. Clark,* No. CR 05-0047 PR (Ariz., May 25, 2005.) Appendix B.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court to review the judgment of the Arizona Court of Appeals is invoked under 28 U.S.C. § 1257(a), petitioner having asserted below and asserting before this Court, the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

U.S.C. Constitution, Amendment XIV provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 13-502 of the Arizona Revised Statutes (1996) provides in pertinent part:

> A. A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. . . .

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Clark was charged and convicted of the first degree murder of Flagstaff Arizona Police Officer Jeffrey Moritz. The Indictment alleged that on June 21, 2000 Clark "intentionally or knowingly" caused the death of a police officer while in the line of duty. (R.O.A.-Doc. 3.)

Clark was 17 years old at the time of the shooting and although there were no eyewitnesses, there was minimal doubt that he in fact shot the officer after the two exchanged gun fire following a traffic stop at 4:50 a.m. in Clark's residential neighborhood. (See generally, Appendix A at 3-5, 8-9.)

Clark's defense at trial was that he was guilty except insane of either the charge of first degree murder or a lesser included offense. (ROA-Doc. 257.) Alternatively, Clark's defense was that as a result of his mental illness he did not have the requisite necessary mental state for the charged offense. In other words, Clark asserted that due to his mental illness he did not intentionally or knowingly kill a police officer so was guilty of a less serious form of homicide. (ROA-Doc. 362; R.T. 8/5/03 at 16-18.) The trial court refused to consider the expert testimony or any other evidence for this purpose of rebutting *mens rea* on the grounds that Arizona law prohibited it. (R.T. 8/19/03 at 5-6.)

All of the numerous mental health experts who examined Clark during the three years before trial agreed that he suffered from the mental disease of schizophrenia, paranoid type, at the time of the shooting and was actively psychotic at the time of the crime. (R.T. 7/10/02 at 16-17, 151-52, 156, 162, 177; R.T. 7/11/02 at 76-88, 103; R.T. 6/26/02 at 12-16, 33, 105-06 Cause M.H. 2000-0080[1], R.T. 9/19/00 at 47-48, 54, 83, 87-89, 90-92; ROA-Doc. 7-192.)

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[1] Immediately following his arrest Petitioner was determined in separate mental health proceedings before a different trial judge, pursuant to Arizona Revised Statutes, Title 36, to be suffering from psychosis and paranoid schizophrenia and therefore gravely disabled and a danger to himself and others. As a result of that proceeding Clark was committed to the Arizona State Hospital for treatment. (Cause MH 2000-0080, R.T. 9/19/00 at 124-27.) Petitioner was also determined by the trial judge in separate proceedings, pursuant to

Two experts testified at trial and both relied extensively upon the previous mental health evaluations in reaching their ultimate conclusions. (R.T. 8/26/03 at 10; trial exhibits 94, 99.) Dr. Barry Morenz, a psychiatrist, testified on behalf of Clark and opined that he suffered from paranoid schizophrenia at the time of the shooting and that it was "highly probable" that he "did not understand right from wrong" at the time of the shooting. (R.T. 8/22/03 at 37-41, 59.) Petitioner also presented the testimony of numerous lay witnesses who observed Clark in the years leading up to the shooting and opined that when he participated in unrelated violent incidents and bizarre behaviors he did not appear to know what he had done or know that what he had done was wrong. (R.T. 8/12/03 at 49-53; R.T. 8/19/03 at 99, 113-14; R.T. 8/20/03 at 135; R.T. 8/21/03 at 7, 26, 73.)

The State conceded at trial that Clark "was suffering from a mental disease or defect" at the time of the shooting but alleged that he understood right from wrong so was therefore not legally insane under Arizona law. (R.T. 8/12/03 at 26; R.T. 8/22/03 at 61.) The State's expert, John Moran,

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Rule 11, *Arizona Rules of Criminal Procedure*, to be incompetent to stand trial and was further committed to the Arizona State Hospital for treatment and restoration to competency which took nearly three years. (ROA-Docs. 16, 18, 156-57, 253; R.T. 3/28/01 at 2-6; R.T. 8/8/01 at 2-3; R.T. 6/26/02, 7/10/02, 7/11/02.) Ultimately, Clark was determined to be competent and his trial was held to the bench. (ROA-Docs. 304-05; R.T. 5/8/03 at 2-3; R.T. 7/28/03 at 2-11.) The parties stipulated that the court could consider all previous mental health testimony including that before the court in the competency and Title 36 proceedings, all of which were part of the record on direct appeal. (See, ROA-Doc. 358; Arizona Court of Appeals Order dated 1/28/04.)

PhD, a psychologist, agreed that Clark was clearly mentally ill and psychotic at the time of the crime. Moran ruled out malingering and concluded that Clark was "overtly paranoid with delusions . . . and/or hallucinations." Ultimately, however, Moran concluded that Clark knew right from wrong at the time of the crime so was not legally insane. (R.T. 8/26/03 at 25-29, 35, 54-67 91, 133-36, 171-73.)

II. PROCEDURAL HISTORY

On September 3, 2003, after taking the matter under advisement following an 11 day trial to the bench, the trial court found Clark guilty of first degree murder and that he had failed to prove (as required under Arizona law) by clear and convincing evidence that he was insane at the time of the crime. (ROA-Doc. 391-392; R.T. 9/3/03 at 4-6.) The trial court sentenced Clark to the minimum sentence of life in prison with eligibility for parole after serving 25 years. (ROA-Doc. 401-402; R.T. 10/2/03 at 73.)

Petitioner filed a Motion to Vacate Judgment on October 2, 2003 raising several additional federal and state constitutional challenges to his conviction and Arizona's insanity law. (ROA-Doc. 406.) The trial court denied the Motion to Vacate. (ROA-Doc. 424.)

Petitioner's direct appeal to the Arizona Court of Appeals was denied following briefing and argument by memorandum decision issued January

25, 2005. (Appendix A.)The Arizona Supreme Court denied Clark's discretionary Petition for Review by Order dated May 25, 2005. (Appendix B.) On June 10, 2005 the Arizona Court of Appeals issued its Order staying the issuance of the mandate of its decision to permit Petitioner leave to file this Petition for Writ of Certiorari. (Appendix C.)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Arizona Court of Appeals incorrectly held that A.R.S. §13-502(A) complies with due process by misinterpreting and misapplying this Court's precedent. Arizona's insanity law violates due process by prohibiting the consideration of evidence of the firmly rooted common law defense of insanity as set forth in the *M'Naghten* Rule. Arizona law further violates due process by precluding evidence of mental infirmity to rebut the state's evidence of *mens rea*. Petitioner was deprived of his fundamental rights to present a complete defense, to the presumption of innocence and to have the charges proved beyond a reasonable doubt. This Court should grant a writ of certiorari to clarify these issues of national importance and the limitation upon a state's power to abolish these defenses and limit the introduction of exculpatory evidence.

History of Arizona's insanity law.

One of the earliest formulations of the legal test for insanity came in *M'Naghten's Case* in 1843. According to that often cited case:

> "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

State v. Schantz, 98 Ariz. 200, 205, 403 P.2d 521 (1965)(quoting, The House of Lords, 10 Clark & Fin. 200, 8 Eng. Reprint 718, 722 (1843)).

This test of legal insanity was a restatement of the test for insanity "as it was known to the common law of England." *Id.* (citing, *Rex v. Arnold*, 16 Howell St. Tr. 695, 764 (1724)). Prior to statehood and early in Arizona's history the courts adopted as a matter of common law the Rule of *M'Naghten's* Case as the test for legal insanity. *See, Lauterio v. State*, 23 Ariz. 15, 201 P. 91 (1921); *Foster v. State*, 37 Ariz. 281, 290, 294 P. 268 (1930); *Judd v. State*, 41 Ariz. 176, 183-84, 16 P.2d 720 (1932). Over time Arizona courts uniformly adopted both prongs of the *M'Naghten* test and, specifically, both aspects of the second prong.

Originally, under Arizona common law a defendant was presumed to be sane and bore only an initial burden of producing sufficient evidence to raise a reasonable doubt as to his or her sanity. Once the defendant sufficiently raised the issue of insanity the common law rule placed the burden on the State to establish the converse, that the defendant was sane, beyond a reasonable doubt. *State v. Daniels*, 106 Ariz. 49, 478 P.2d 522 (1970); *State v. Cano*, 103 Ariz. 37, 436 P.2d 586 (1968).

Since early territorial days Arizona continued to recognize that insanity excused completely a defendant's criminal culpability. Ariz. Pen. §

21 (1901) and by case law followed the *M'Naghten* test. Arizona's legislature formally adopted the *M'Naghten* test in 1978 when it promulgated A.R.S. § 13-502 which in its original form provided:

> "A person is not responsible for criminal conduct if at the time of such conduct the person was suffering from a mental disease or defect as not to know the nature and quality of the act, or if such person did know that he did not know that what he was doing was wrong."

1977 Ariz. Sess. Laws, ch. 142, § 5.

With its passing of the 1978 Arizona Criminal Code the legislature also abolished all common law affirmative defenses unless specifically adopted by statute. 1977 Ariz. Sess. Laws, ch. 142, § 39.

Like many states, Arizona modified its insanity laws in 1983 following John Hinckley's acquittal by reason of insanity on his charges relating to the attempted assassination of President Ronald Reagan. The 1983 modification placed the burden of proof upon the defendant and raised it to clear and convincing evidence. A.R.S. § 13-502(C) (1983). Ten years later the Arizona legislature completely revamped the statute by eliminating entirely the not guilty by reason of insanity defense and in place adopting a "guilty except insane" defense and verdict. "The new statute essentially abandoned the first prong of the *M'Naghten* test, limiting the availability of the insanity defense to a person who, at the time of the criminal act, was

'afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong.'" *State v. Tamplin,* 195 Ariz. 246, 248, 986 P.2d 914 (App. 1999).

Thus, at the time of Clark's trial Arizona law provided that he bore the burden of proving by clear and convincing evidence that he suffered from a mental disease that caused him to not know that his act of shooting the police officer was wrong.

(1) Arizona's abolition of the "nature and quality of the act" aspect of the *M'Naghten* insanity test violates Petitioner's right to due process by precluding him from exercising a fundamental right recognized at common law. The Arizona Court of Appeals misinterpreted and misapplied this Court's decisions in *Medina v. California,* 505 U.S. 437, 449 (1992) and *Paterson v. New York,* 432 U.S. 197, 201-02 (1977). This Court should grant the writ to address this issue of national importance.

The Arizona Court of Appeals rejected Petitioner's due process challenge to the Arizona legislature's abolishment of the "nature and quality of the act" aspect of the *M'Naghten* test by relying upon this Court's decisions in *Medina v. California,* 505 U.S. 437, 449 (1992) and *Paterson v. New York,* 432 U.S. 197, 201-02 (1977). (Appendix A at ¶ 37.) This ruling misinterprets and improperly expands the Court's limited ruling in those cases as to one that sanctions the complete abolishment of the insanity defense. In reality, this Court has never directly addressed this issue of national importance. This Court should grant the writ because the lower

court's decision involved an important question of federal law in a way that both conflicts and distorts this Court's prior decisions and because this Court has never squarely decided this issue of national importance. Rule 10(C), Supreme Court Rules.

a) The Arizona Court of Appeals' decision is contrary to and misinterprets this Court's precedent.

In *Medina* this Court held that "*procedural* due process" was not violated by placing the burden of proving incompetence on the defendant as there was insufficient evidence of the "historical treatment of *the burden of proof* in competency proceedings" to conclude otherwise. Within the context of this limited procedural issue this court noted in passing that "we have not said that the Constitution requires the States to recognize the insanity defense." 505 U.S. at 449 (citing *Powell v. Texas*, 329 U.S. 514, 536 (1982)). It is clear that this Court's pronouncements in *Medina, Powell* and later cases reached only the *procedures* a state implements or chooses not to implement to prove insanity, not the substantive defense itself or more fundamental right to contest the State's case on the fundamental element of *mens rea*.

This distinction was made clear by the Court in *Leland v. Oregon*, 343 U.S. 790 (1952). In *Leland* this Court rejected Petitioner's due process challenge to the state's procedure of placing a beyond a reasonable doubt

burden of proof on a defendant asserting the insanity defense. While the Court did not adopt one procedure or test for establishing insanity, it noted that the state was still required to prove every element of the charge beyond a reasonable doubt and therefore the method chosen by Oregon did not violate a basic standard of justice. By not sanctioning any given procedure the court implied that the substantive defense of insanity is a fundamental principle of our system of justice. *Id.* at 799.

Similarly, in *Paterson v. New York*, 432 U.S. 197, 201-02 (1977) this Court similarly held that due process was not offended by a New York law that placed the burden of proving the affirmative defense of extreme emotional disturbance upon the defendant. It was within the context of this *procedural* issue that this Court stated: "it is normally 'within the power of the State to regulate *procedures* under which its laws are carried out, including the burden of producing evidence and the burden of persuasion . . .' " *Id.* (citations omitted.)

Neither of the foregoing statements were essential to this Court's decisions since both cases involved only the *procedures* for establishing competency or a mental health defense and not the *substantive* defense of insanity as it has been historically recognized in the common law. This Court's statements were therefore *dicta* improperly applied by the Arizona

Court of Appeals. *See, State v. Searcy,* 798 P.2d 914 923 (Idaho 1990)("Thus, it cannot be said that by allowing the burden of proof to be shifted away from the prosecution on issues which are not elements of the crime charged, the Supreme Court is thereby sanctioning the abolition of the underlying substantive criminal legal traditions.")

The origins of the misinterpretation of this Court's holding in *Medina* comes from *dicta* in *Powell v. Texas,* 329 U.S. 514, 536 (1982) where the issue was whether a statute that punished public drunkenness violated the Eighth Amendment by punishing an involuntary status rather than a voluntary criminal act. In rejecting appellant's position, the Court stated:

> The doctrines of *actus reas, mens rea,* **insanity,** mistake and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States. *Id.* (bold added.)

As more recently recognized:

> "When read in context, the comments in *Powell* support the Supreme Court's longstanding policy to generally permit the states to determine the details of how to implement well-established doctrines. In other words, how a state chooses to present the issue of legal insanity is left up to state law. *Powell* cannot be read to stand for the proposition that the concept of legal insanity, i.e., an inability to form the requisite mens rea, is not a fundamental principal of our jurisprudence entitled to protection under the Due Process Clause." *Finger v. State,* 27 P.3d 66, 83 (Nev. 2001).

The distortion finds further fictional support from Justice Rehnquist's *dissenting* opinion in *Ake v. Oklahoma*, 470 U.S. 68, 91 (1985) where he wrote: "It is highly doubtful that due process requires a State to make available an insanity defense to a criminal defendant, but in any event if such a defense is afforded the burden of proving insanity can be placed on the defendant." Reliance upon this misplaced *dictum* confuses the fundamental difference between the *substantive* defense of insanity from the *procedural* aspects of the defense. *Cf., State v. Fletcher*, 149 Ariz. 187, 192, 717 P.2d 866, 891 (1986)(Insanity "is a *substantive* matter affecting the guilt or innocence of a defendant.") The Arizona Court of Appeals' decision has confused substantive and procedural law and should be vacated by this Court as a matter of due process.

b) The Court has not yet directly addressed this issue of national importance.

Notwithstanding the lower court's misinterpretation of both *Medina* and *Patterson*, this Court has actually never directly addressed this issue, and never held that a State may, consistent with due process, abolish the insanity defense as it existed at common law. *State v. Searcy*, 798 P.2d 914 923 (Idaho 1990)("there is no explicit holding from the United States Supreme Court on this issue. . . .") This issue does not simply involve this Petitioner and Arizona's abolishment of a substantial portion of the insanity

defense. This issue also involves a body of law which appears to stand alone as a jurisdiction that both greatly curtails the insanity defense as recognized at common law while also prohibiting consideration of this type of evidence on the issue of *mens rea.* This treatment of these long recognized interrelated defenses does not comport with the federal treatment of such evidence. *See, United States v. Pohlot,* 827 F.2d 889 (3rd Cir. 1987)(discussing the legislative history of the Insanity Defense Reform Act of 1984 in detail and interpreting the Act as limiting the affirmative defense of insanity to the traditional *M'Naghten* Rule *and* also permitting such evidence on the issue of *mens rea.* Noting that Congress refused to abolish the insanity defense because it "would alter that fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment." Quoting H.R.Rep. No. 98-577, 98th Cong. 1st Sess. at 7-8 (1983)).

This Court should grant the writ because this issue impacts a growing number of states that have in the recent past abolished the insanity defense completely or severely limited its application (some of which survived constitutional scrutiny by the legislature's enactment of a *mens rea* defense in place of the insanity defense.) The various states do not uniformly address this issue as a matter of federal due process. *See, State v. Bethel,* 66 P.3d 840 (Ka. 2003) cert. denied 540 U.S. 1006 (2003)("Each of those legislatures'

actions abolishing the insanity defense an substituting alternative procedures for considering a criminal defendant's mental condition at the time of the offense was held to constitutional."); *Finger v. State*, 27 P.3d 66 (Nev. 2001) cert. denied 534 U.S. 1127 (2002) ("While courts and scholars may debate what standard or definition should apply in determining what constitutes legal insanity, or by what method it should be raised, all have agreed that due process requires that a defendant be able to present evidence and argue that he or she lacked the *mens rea* to commit the criminal act."); *State v. Herrera*, 895 P.2d 359 (Ut. 1995); *State v. Searcy*, 798 P.2d 914 (Idaho 1990); *State v. Korell*, 690 P.2d 992 (Mont. 1984).

Historically, however, numerous states have held that abolishing both the insanity defense and consideration of such evidence to contest *mens rea* does not comport with federal due process. *See, Sinclair v. State*, 132 So. 581 (Miss. 1931)(holding unconstitutional a statute that provided that insanity was not a defense to murder since the crime involves specific intent); *State v. Lange*, 123 So. 639 (La. 1931)(abolishing the insanity defense while also not permitting such evidence to contest *mens rea* violates due process); *State v. Strasburg*, 110 P. 1020 (Wa. 1910) (abolishing the insanity defense as to any crime violates due process).

This Court should grant the writ since Arizona has chosen to be in the ever shrinking minority of states that refuse to permit consideration of mental infirmity evidence on the issue of *mens rea* (see argument (3) below) and also abolished a substantial portion of the insanity defense. This combination violated Petitioner's fundamental right to present a defense and therefore violates due process.

c) The *M'Naghten* Rule is deeply rooted in the common law. Abolishing the Rule without providing for a *mens rea* defense violates due process.

The touchstone of due process is fundamental fairness. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)(Due process mandates protection of those principals deemed "fundamental to the American scheme of justice.") A state's decision regarding the administration of justice is subject to proscription under due process if "it offends some principle of justice so rooted in traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 201-02. Due process guarantees a defendant "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). Due process also protects a defendant's right "to present the defendant's version of the facts as well as the prosecution's to the jury so it may determine where the truth lies." *Washington v. Texas*, 338 U.S. 14, 19 (1967).

The "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996). The insanity defense "has its roots in ancient Judaic, Christian and Roman Law." *Neely v. Newton*, 149 F.3d 1074, 1079 (10th Cir. 1998).

This Court's pronouncements over the past century reveal how ingrained the insanity defense, and the *M'Naghten* Rule in particular, have been as a part of substantive criminal law. In *Davis v. United States*, 160 U.S. 469 (1895) this Court recognized the deep historical roots and universal acceptance of the insanity defense. The Court stated:

> "No one we assume, would wish either the courts or juries, when trying a case of murder, to disregard the humane principle, existing at common law and recognized in all the cases tending to support the charge of the court below, that 'to make a complete crime cognizable by human laws, there must be both will and an act.'" . . . .
>
> "Although the killing of one human being by another human being with a deadly weapon is presumed to be malicious until the contrary appears, yet 'in order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if through the overwhelming violence of mental disease, his intellectual power is for the time obliterate, he is not a responsible moral agent, and is not punishable for criminal acts.' Com. v. Rogers, 7 Metc. (Mass.) 501. Neither in the adjudged cases nor in the elementary treatises upon criminal law is there to found any dissent from these general propositions." *Id.* at 484-85.

More recently the Court recognized that the law protects those who are incompetent and unable to form the requisite mens rea from being punished by acquittal through the common law principle of insanity. Justice O'Connor wrote:

> "The common law prohibition against punishing 'idiots' for their crimes suggest that it may be 'cruel and unusual' punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions. Because of the protections afforded by the insanity defense today, such a person is not likely to be convicted or face the prospect of punishment."

Penry v. Lynaugh, 492 U.S. 303, 333 (1989).

Legal historians have traced the first recognition of the need to treat a mentally ill person different in the context of criminal punishment to the sixth century, B.C.

> "As early as the sixth century B.C., commentary on the Hebrew scriptures distinguished between the harmful acts traceable to fault and those that occur without fault. To those ancient scholars, the paradigm of the latter type of act was one committed by a child, who was seen as incapable of weighing the moral implications of personal behavior, even when willful; retarded and insane persons were likened to children."

Platt & Diamond, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 J.Hist.Behav.Sci. 335, 366 (1965).

Legal insanity has been an established concept of English common law for centuries. "The insanity defense existed as an excuse to crime by the

time of the reign of Edward I (1272-1307)." *State v. Searcy*, 798 P.2d 914, 928-33 (Idaho 1990)(McDevitt, J., dissenting)(citing III Holdsworth, *A History of English Law*, 371 (1908)(extensively tracing the roots of the insanity defense and right and wrong formulation). "Since the reign of Edward II (1307-1321), English law acknowledged that an individual who *does not know what he is doing or that what he is doing is wrong* cannot be held criminally liable." *Searcy, supra.*, 798 P.2d at 928 (quoting, Briggs, *The Guilty Mind*, at 82 (1955)(emphasis added)).

By 1724 English commentators readily accepted that guilt "of offending against any Law whatsoever, necessarily supporting a willful disobedience, can never justly be imputed to those who are *either incapable of understanding it, or of conforming themselves to it.*" *Searcy, supra.*, 798 P.2d at 929 (quoting Hawkins, *A Treatise of the Pleas of the Crown*, vol. I, p. 1 (1724)(emphasis added.)The Arizona Supreme Court has also recognized that the *M'Naghten* Rule "was in substance the test of legal insanity as it was known to the common law of England." *State v. Schantz*, 98 Ariz. 200, 210-14, 403 P.2d 521, 531-34 (1965).

As more recently observed:

> "[R]ecognition of insanity as a defense is a core principle that has been recognized for centuries by every civilized system of law in one form or another. Historically, the defense has been formulated differently, but given the extent of knowledge

> concerning principles of human nature at any given point in time, the essence of the defense, however formulated has been that *a defendant must have the mental capacity to know the nature of his act* ***and*** *that it is wrong.*

State v. Herrera, 895 P.3d 359, 372 (Utah 1995)(Stewart, J. dissenting) (emphasis added.)

The decision below also neglects to consider that Arizona has abolished a significant component of the long standing common law *M'Naghten* Rule after previously abolishing all common law defenses including diminished capacity.[2] This oversight fails to recognize the inseparable relationship between legal insanity and *mens rea*. These limitations violate due process, not simply because the insanity defense has been recognized from the early beginnings of criminal law, but because these limitations violate a defendant's fundamental right to present a *complete* version of the facts and to present a *complete* defense. *See, California v. Trombetta*, 467 U.S. 479, 485 (1984); *Washington v. Texas*, 338 U.S. 14, 19 (1967). *See also, Morissette v. United States*, 342 U.S. 246, 250-51 (1952)("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the

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[2] *See, State v. Schantz*, 98 Ariz. 200, 210-14, 403 P.2d 521, 531-34 (1965) (discussing the legislature's decision to reject the Model Penal Code provision allowing evidence of mental disease or defect when relevant to whether a defendant possessed the requisite state of mind.) *See also* A.R.S. § 13-103(A).

human will and a consequent ability and duty of the normal individual to choose between good and evil.")

In *Finger, supra,* the Nevada Supreme Court specifically held that the insanity defense is a fundamental aspect of criminal law that may not be abolished without violating due process. After an exhaustive tracing of the history of the insanity defense in American jurisprudence the court concluded:

> "Insanity is a mental condition that interferes with the ability of a person to form criminal intent. Individuals are considered to be legally insane when their mental condition rises to a level so as to relieve them of criminal culpability for their actions because they are incapable of developing the necessary mens rea. Where the mens rea of a crime requires that defendants understand the *nature and consequences of their conduct and that the conduct is wrong,* then legal insanity is established when one of these two elements is missing. This is the *M'Naghten* Rule. The Legislature cannot abolish the concept of legal insanity." 27 P.3d at 91.

The Nevada Supreme Court did not rely exclusively upon its belief that the *mens rea* element of a crime includes the concept of wrongfulness. In addition, the *Finger* Court recognized, more fundamentally, that there is an interrelationship between being legally insane and being unable to formulate the requisite *mens rea* to commit the crime.

> "*Mens rea* is a fundamental aspect of criminal law. Thus it follows that the concept of legal insanity, that a person is not culpable for criminal act because he or she cannot form the necessary mens rea, is also a fundamental principle. Indeed the

> term "legal insanity" simply means that a person has a complete defense to a criminal act based on the person's inability to form the requisite criminal intent. . . .
>
> It is because legal insanity is a corollary of *mens rea*, the mental state that imposes criminal responsibility upon an individual, that legal insanity is a fundamental principle under the Due Process Clause." *Id.* at 80.

The Court of Appeals also incorrectly concluded that the first prong of *M'Naghten* (nature and quality of the act) did not "add significantly to the test available in the statute." (Appendix A at ¶ 38 citing *Foucha v. Louisiana*, 504 U.S. 71, 97-99 (1992)(Kennedy, J. dissenting.) *Foucha*, of course, had nothing to do with the State's power to abolish a defense recognized at common law but dealt with a state's right to further confine a person after being found not guilty by reason of insanity.

The appellate court's conclusion ignores the reality of cases such as this where everyone agrees that the defendant is psychotic and not in touch with reality, but ignores that distorted reality for a fiction that one who knows right from wrong but does not operate in reality is "sane." This reasoning assumes that the first prong means only that the defendant does not know what the act is that he is doing. The absurdity of this conclusion is evidenced by the following simple example:

> "So, if a jury believes he was suffering from a delusional state, and if the facts as he believed them to be in delusional state would justify his actions, he is insane and entitled to

> acquittal. If, however, the delusional facts would not amount to a legal defense, then he is not insane. Persons suffering from a delusion that someone is shooting at them, so they shoot back in self-defense are insane under *M'Naghten.* Persons who are paranoid and believe that the victim is going to get them some time in the future, so they hunt them down first, are not. "

Finger, supra, 27 P.3d at 84-85.

This important distinction between the two aspects of the second prong of *M'Naghten* was clearly recognized by the United States Justice Department which fought for the continued federal codification of the complete defense. Then Attorney General William French Smith argued:

> "Under any approach, the Government will always be required to prove every element of the statutory offense that is charged. This includes any specific intent or knowledge required by statute. In the rare case, therefore, in which a defendant is so deranged that, for example, *he did not know that he was shooting a human being, one of the elements of the offense could not be proved - the mental element of mens rea* – and he could not be convicted under current law or under any constitutionally supportable change in the law."

Poholt, supra., at ¶ 69 (quoting *Hearings on Bills to Amend Title 18 to Limit the Insanity Defense, Senate Judiciary Committee,* 97th Cong., 2d Sess. 30 (1982) (emphasis added).

To illustrate further the impact of Arizona's law in the instant case: If Clark, in his delusional state, believed that Officer Moritz was an alien that was trying to kill him then he would be guilty except insane under the first prong of *M'Naghten* since he would not understand the nature and quality of his acts even though he may know killing is "wrong." Under the current

Arizona law this is not legal insanity since Clark supposedly knew that killing was wrong. The abolishment of the first prong therefore precluded the trial court from considering that Clark was insane because he believed he was being attacked by an alien,[3] which would be insanity under traditional *M'Naghten* and current federal law. In a case where everyone agrees the defendant was psychotic (not in touch with reality) due process requires consideration of the fact that the defendant did not understand the nature and quality of his acts. The writ should issue.

(2) Arizona's refusal to permit the consideration of exculpatory *mens rea* evidence violates due process. The Arizona Court of Appeals decision in this case, that relies upon the Arizona Supreme Court's decision in *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997) is contrary to and misinterprets this Court's decisions in *United States v. Fischer*, 328 U.S. 463 (1946) and *Montana v. Egelhoff*, 518 U.S. 37 (1996) and the majority of federal precedent. This Court should grant the writ to clarify this issue of national importance as a majority of states and federal jurisdictions recognize that *mens rea* evidence is mandated by due process.

a) The Arizona Supreme Court's decision is contrary to and misinterprets this Court's precedent.

The Arizona Court of Appeals did not reach this issue as it recognized that it was constrained by the Arizona Supreme Court's decision in *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997). (Appendix A at ¶ 45.) In *Mott*

[3] There was substantial evidence presented at trial that Clark believed his home town had been taken over by aliens and that very few humans remained. Clark further believed that he was being held captive and tortured by the aliens and the only way to destroy the aliens was with bullets. (See e.g., MH 2000-0080, R.T. 9/19/00 at 84; R.T. 8/20/03 at 42-45, 130-32, 136; R.T. 8/21/03 at 24-25; R.T. 8/26/03 at 18-21, 103-11.)

the Arizona Court precluded expert testimony on the battered woman syndrome offered in by a defendant charged with intentional child abuse and first degree murder to show that she could not form the *mens rea* required for conviction. Ultimately the Court overruled prior case law and established a blanket rule that prohibited the introduction of any evidence of mental defect unless offered in support of the statutory insanity defense. The *Mott* Court concluded that "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime." *Id.* at 541.

The Court of Appeals decision in this case and the *Mott* decision are premised upon the misinterpretation of this Court's decisions in *United States v. Fischer*, 328 U.S. 463 (1946) and *Montana v. Egelhoff*, 518 U.S. 37 (1996), neither of which addressed whether precluding a defendant from offering factual evidence regarding an *involuntary* mental illness to rebut the government's evidence or negate *mens rea* violates due process. Neither case squarely reached the issue.

In *Fischer* this Court held only that due process did not mandate that the District of Columbia permit the use of the "diminished responsibility" defense. That holding is consistent with this Court's long standing view that it is not the place of the federal judiciary to regulate the criminal law

doctrines of "*mens rea, actus rea*, insanity, mistake, justification and duress." *Egelhoff*, 518 U.S. at 516. However, this Court was not determining whether the District of Columbia could, consistent with due process, prohibit the introduction and consideration of evidence of mental infirmity to rebut the government's case for *mens rea*. In fact, in *Fischer* the trial court permitted the defendant to introduce psychiatric testimony from which the jurors were instructed they could infer he did not possess the requisite mental state. The jury was actually permitted to find the defendant guilty of either first or second degree murder or manslaughter based upon its consideration of his mental state from all of the evidence. The only matter this Court sanctioned was the trial court's refusal to instruct the jury on the diminished responsibility *defense*." 328 U.S. at 466-67, n. 3.

It has long been recognized that there is a substantial distinction between the "diminished capacity *defense*" (addressed by this Court in *Fischer*) and "diminished capacity *evidence*." "The first variant of what courts have called 'diminished capacity' defenses inappropriately is the evidentiary doctrine which . . . is not a defense at all but merely a rule of evidence: specifically, the admission of evidence of mental abnormality to negate *mens rea*." "A second strain of diminished capacity permits a defendant to show not only that he lacked the *mens rea* in a particular case

but also that he lacked the *capacity* to form *mens rea.*" *Poholt, supra.*, 827 F.2d at 903. "Properly understood, it is . . . not a defense at all but merely a rule of evidence." *Id.* at 897. *See also, State v. Phipps,* 883 S.W.2d 138, 143 (Tenn.Cr.App. 1994)("In actuality, diminished capacity is not a defense that absolves the accused from culpability; rather, it is a rule of evidence which allows the introduction of evidence to negate the existence of specific intent when a defendant is charged with a specific intent crime.")

It is this distinction, between offering this evidence as an affirmative *defense* and as *rebuttal evidence* that was confused by the Arizona Supreme Court in *Mott* and which led to its erroneous ruling that has now been unconstitutionally applied to Petitioner's case. Exclusion for the latter purpose is encompassed by this Court's ruling in *Fischer,* whereas the former is directly prohibited by this Court's precedent as being in violation of due process.

b) Arizona's prohibition of exculpatory evidence violates due process.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation Clause of the Sixth Amendment, the Constitution Guarantees criminal

defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)(quoting *California v. Trobetta*, 467 U.S. 479, 485 (1984)).

This Court has repeatedly held that the exclusion of competent and reliable exculpatory evidence by a state violates due process by infringing upon a defendant's fundamental right to defend the charges against him or her. *See e.g., Rock v. Arkansas*, 483 U.S. 44 (1987)(striking down state rule preventing defendant from testifying on issues previously the subject of hypnosis); *Crane v. Kentucky*, 476 U.S. 683 (1986)(reversing conviction that excluded evidence of circumstances surrounding confession); *Chambers*,, 410 U.S. at 299-302 (ordering new trial where court excluded adverse witness' out of court confession); *Washington v. Texas*, 388 U.S. 14, 22 (1967)(striking down statute that prohibited the testimony of defendant's alleged accomplice). Thus, the exclusion of rebuttal evidence may be contrary to due process when it has "infringed on the weighty interests of the accused." *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

Whether the exclusion of such rebuttal evidence violates due process requires proof that admission of such evidence "was so deeply rooted at the time of the Fourteenth Amendment (or perhaps has become so deeply rooted since) as to be a fundamental principle which that Amendment enshrined."

Egelhoff, 518 U.S. at 48. While the introduction of evidence of intoxication was not so "deeply rooted" as to be circumscribed by due process in *Egelhoff*, the same is not true for the introduction of evidence to negate or rebut *mens rea*.

It is, of course, a foundation of criminal law and due process that the state must prove all the elements of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). Several courts have squarely reached this issue and held that due process if violated when a state excludes diminished capacity evidence offered to rebut *mens rea* because it both infringes upon the right to defend oneself, the presumption of innocence and reduces the government's burden of proof. *See e.g., Hendershott v. People*, 653 P.2d 385, 391 (Colo. 1982) *cert. denied* 459 U.S. 1225 (1983); *People v. Whitler*, 214 Cal.Rptr. 610, n.1 (Ca.App. 1985). This conclusion is mandated by this Court's precedent.

> "When, however, an accused is precluded from controverting the prosecution's evidence on the element of *mens rea*, the jury's deliberative process on that element is limited to the single evidentiary consideration of whether the prosecution has met its constitutional burden of proof. Under such circumstances the issue of *mens rea* will be resolved solely on the basis of the jury's inference of this element from the prosecution's uncontestable evidence. An inference, the existence of which as a matter of law cannot be controverted, in practical effect becomes so compelling as to assume all of the features of a presumption. Such a *de facto* presumption of *mens rea* clashes head-on with 'the overriding presumption of

> innocence with which the law endows the accused and which extends to every element of the crime. . .' *Morrissette v. United States,* 342 U.S. at 75. [ ]; *Sandstrom v. Montana,* [442 U.S. 510, 520-24 (1979)]; *United States v. Gypsum,* 438 U.S. 422 [ ] (1978)."

Hendershott, 653 P.2d at 393 (additional citation omitted.)

In the instant matter the trial court, based upon the binding precedent of *Mott,* refused to consider whether as a result of Clark's paranoid schizophrenia the state had failed to prove that he "intentionally or knowingly" killed a police officer and was therefore not guilty of first degree murder. (R.T. 8/19/03 at 5-6.) It is submitted that both the trial court's decision and the *Mott* decision upon which it was based violated Petitioner's due process rights to present a complete defense, to the presumption of innocence and to proof beyond a reasonable doubt. This Court should grant the writ to remedy this violation of due process and clarify a state's power to preclude exculpatory mental infirmity evidence.

c) Arizona's rule prohibiting exculpatory evidence to rebut *mens rea* is contrary to the overwhelming majority of federal and state authority.

Arizona stands in the ever growing minority of jurisdictions that refuse to permit evidence of mental infirmity on the issue *mens rea.* The overwhelming majority of federal circuit courts have recognized the right of defendant to present this evidence as a defense to *mens rea. See., United*

States v. Moran, 937 F.2d 604 (4th Cir. 1991); *United States v. Cameron*, 907 F.2d 1051 (11th Cir. 1990); *United States v. Newman*, 889 F.2d 88 (6th Cir. 1989); *United States v. Brown*, 880 F.2d 1012 (9th Cir. 1988); *United States v. Bartlett*, 856 F.2d 1071 (8th Cir. 1988); *United States v. Poholt*, 827 F.2d 889 (3rd Cir. 1987); *United States v. McBride*, 786 F.2d 45 (2nd Cir. 1986). As best summarized by the Court of Appeals for the District of Columbia:

> "[E]xpert testimony as to a defendant's abnormal mental condition may be received and considered, as tending to show, in a responsible way, that defendant did not have the specific mental state required for a particular crime or degree of crime - even though he was aware that his act was wrongful and he was able to control it, and hence was not entitled to complete exoneration."

United States v. Brawner, 471 F.2d 969, 998 (D.C. Cir. 1972).

Similarly, the overwhelming majority of state courts permit introduction and consideration of this type of evidence. *See, State v. Joseph*, 590 S.E.2d 718 (W.V. 2003)(citing cases); *State v. Gracewski*, 767 A.2d 173 (Conn. 2001); *New Jersey v. Delibero*, 692 A.2d 981, 986 (N.J. 1997); *Penry v. State*, 903 S.W.2d 715, 768 (Tex.App. 1995)("Most of the state and federal courts recognize that evidence of diminished capacity is admissible to negate mental state."); *State v. Phelps*, 883 S.W.2d 138, 145, n.15 (citing 29 different state court decisions), 146 (Tenn.App. 1994)("Thus it is clear

that the vast majority of jurisdictions that have addressed the issue, allow evidence of a defendant's mental state to negate the existence of mens rea.; *See also,* Annot. *Mental or Emotional Condition as Diminishing Responsibility for Crime,* 22 A.L.R.3d 1228, 1238-40 (1968).

Additionally, both the ABA Criminal Justice Mental Health Standards, Standard 7-6.2 (1989) and the ALI Model Penal Code, § 4.02(1) provide that evidence concerning a defendant's mental condition should be admissible at a criminal trial whenever it is relevant to prove that a defendant did or did not have the sate of mind required for the offense charged. Arizona's blanket refusal to admit such evidence nearly stands alone in the field of criminal law. The writ should issue.

CONCLUSION

Based upon the foregoing it is respectfully requested that this Court grant the writ of certiorari.

RESPECTFULLY SUBMITTED this 17th day of August, 2005

David Goldberg, Esq.
Attorney for Petitioner

APPENDIX A

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED
JAN 25 2005
PHILIP G. URRY, CLERK
By

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ERIC MICHAEL CLARK, Appellant.	)	1 CA-CR 03-0851 1 CA-CR 03-0985 (Consolidated) DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court) **(Amended by Order filed 5-5-05)**

Appeal from the Superior Court in Coconino County

Cause No. CR 2000-0538

The Honorable H. Jeffrey Coker, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Randall M. Howe, Chief Counsel,
Criminal Appeals Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

David Goldberg — Flagstaff
Attorney for Appellant

S N O W, Judge

¶1 Eric Michael Clark, appeals from his conviction and sentence for first degree murder, a Class 1 felony. He argues: (1) that substantial evidence did not support his conviction for first degree murder; (2) that the court abused its discretion in finding that he had not proven, by clear and convincing evidence, that he

was insane at the time of the murder; (3) that Arizona Revised Statutes ("A.R.S.") section 13-502(A) (2000) violates the due process and equal protection clauses of the Arizona and United States Constitutions; and (4) that his sentence of life in prison without the possibility of parole for twenty-five years is disproportionate of the crime committed and therefore violates the Eighth Amendment interdiction against cruel and unusual punishment. For reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the verdict and resolve all inferences against the appellant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

¶3 In June 2000, a few weeks prior to the murder, Clark commented to some friends having a barbecue in a park in Flagstaff, Arizona, that he wanted to shoot police officers. One friend remembered him saying: "If I came up here with my .22 caliber hand pistol . . . and started firing off, when the police come, I will get them out of their cars and start -- I have rifles and I'll start shooting them in the head." That same friend recalled another instance a month or two before the shooting in which Clark made a comment that suggested that he was angry with police and "wanted to show them."

¶4 Sometime in the early morning of June 21, 2000, Clark went to his parents' house on University Heights Drive South and took the keys to his brother's green Toyota pickup truck. He then began driving around an adjacent neighborhood, blaring loud music from the radio and disturbing the residents. One resident estimated that Clark drove about twenty-two laps around the same block. He called the police to report it around the eighteenth lap.

¶5 Flagstaff Police Officer Jeffrey Moritz responded and located the pickup truck. It started "running from" him, and Moritz activated his emergency lights and made the stop. He informed dispatch that he was going to "be out with him," meaning the driver of the truck. Moments later Moritz radioed, "999[1], I've been hit. 999, I've been hit." Moritz then stumbled towards a nearby home, holding his chest and calling for help, until he collapsed on the ground. Clark abandoned the truck and took off on foot towards his house.

¶6 Residents heard two sets of gun shots: one a series of shots from Clark's .22 caliber handgun; the other, shots from Moritz's .40 caliber service weapon. One resident had also heard a strong voice give several commands to stay inside the vehicle shortly before hearing the shots.

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[1] This is the code for "officer needs assistance immediately."

¶7 Several officers converged on the scene based on Moritz's "999" call. Flagstaff Police Captain Brent Cooper, who lived nearby, also responded after he and his wife heard a police siren and gunfire. He was the first on the scene, arriving within "a couple of minutes" of hearing the gunshots. He found Moritz lying on the ground, twenty feet behind his police car, face up, with a small group of civilians around him. Moritz's service revolver was on the ground to the left of his body. When Cooper saw Moritz's face, he "was afraid he was gone then." All attempts to revive him proved futile.[2]

¶8 Moritz's police car was parked in the street a little behind the Toyota pickup truck. The police car's engine was still running and the overheard emergency lights were activated. The pickup truck's engine was off and its driver's side door was open.

¶9 Based on the truck's registration, police officers proceeded to Clark's parents' home on the adjacent block and set up a perimeter around the house. Clark was not found in the house, and his mother advised officers that he was "missing." At 9:00 p.m. on June 21, a Flagstaff police officer spotted Clark on a sidewalk on University Heights Drive, but Clark ran away with

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[2] The medical evidence at trial was that the blood supply to his brain would have been restricted as two of the four major vessels to the brain had been impaired by the trajectory of the bullet, which would have limited his ability to "mobilize and do much of anything physiologic" within two to four minutes of being shot.

several officers in pursuit. Police subsequently arrested Clark at gunpoint.

¶10 When he was arrested, Clark had gunshot residue on his hands. Police found the .22 caliber handgun Clark used to shoot Moritz in a yard in the vicinity of the shooting. The gun was inside a knit cap, and tests of the gun and the cap disclosed DNA that matched Clark's.

¶11 The state charged Clark with one count of first degree murder, for intentionally or knowingly killing a law enforcement officer who is in the line of duty. A.R.S. § 13-1105(3). The state did not seek the death penalty. On March 28, 2001, the trial court accepted the parties' stipulation that Clark was not competent to stand trial and committed Clark to the Arizona State Hospital for treatment. On May 8, 2003, the trial court found that Clark was competent to stand trial.[3]

¶12 Clark waived his right to a jury trial, and the matter was tried to the court. In addition to other theories, Clark's primary defense was that he was legally insane at time he shot Moritz.[4] At

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[3] The trial court specifically found that Clark was able to understand the nature of the charges, and that he could, "if he chooses, assist his attorney in his defense." The court further found that Clark's "status at this point in time is one of volition; in other words, he is choosing not to cooperate with his attorney at this time as opposed to being unable to."

[4] Defense counsel also argued that Clark was delusional and therefore did not know that Moritz was a police officer or that the shooting might have been the inadvertent result of a struggle over

(continued...)

the conclusion of the trial, the trial court rejected Clark's insanity defense and found him guilty of the first degree murder of Officer Moritz.

¶13 On October 2, 2003, the trial court sentenced Clark to life in prison without the possibility of release on any basis until he had served a minimum of twenty-five calendar years. Clark timely appealed. He also filed a motion to vacate the judgment, which the trial court denied. Clark then timely filed a supplemental notice of appeal from the denial of the motion to vacate judgment. Both matters were consolidated on appeal.

¶14 This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(1) (1992), 13-4031 and 13-4033(A)(1) (2001).

DISCUSSION

(1) *Sufficiency of the Evidence*

¶15 Clark maintains that there was insufficient evidence to support his conviction for first degree murder of a police officer.[5] He rests this argument on his claim that the state presented only circumstantial evidence to show that he (1) intentionally or

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[4](...continued)
the weapon. He therefore asked the court to consider lesser included offenses of second degree murder and manslaughter.

[5] A.R.S. § 13-1105(A)(3) provides in relevant part that a person commits first degree murder if: "Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty."

knowingly caused a death and/or (2) that he intended or knew that he was killing a police officer. He therefore contends the trial court abused its discretion when it denied his motion for directed verdict.[6] We conclude that it did not.

¶16 We review the denial of a Rule 20 motion for an abuse of discretion. *State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996). In so doing, we view the evidence in the light most favorable to supporting the verdict. *Id.* (citations omitted). This court "will not reverse a trial court's determination on grounds of insufficient evidence unless there is a complete absence of probative facts or where the judgement is contrary to substantial evidence in the record." *State v. West*, 173 Ariz. 602, 610, 845 P.2d 1097, 1105 (App. 1992) (citation omitted).

¶17 When reviewing the sufficiency of the evidence, we make no distinction between the probative value of direct and circumstantial evidence. *State v. Bible*, 175 Ariz. 549, 560 n. 1, 858 P.2d 1152, 1163 n. 1 (1993). "Evidence is sufficient if there is more than a scintilla of proof for a reasonable mind to support the conclusion." *West*, 173 Ariz. at 610, 845 P.2d at 1105 (citing *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984)).

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[6] Ariz. R. Evid. 20(a) provides in relevant part: "On motion of a defendant or on its own initiative, the court shall enter a judgment of acquittal of one or more offenses charged in an indictment, information or complaint after the evidence on either side is closed, if there is no substantial evidence to warrant a conviction."

"If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered substantial." *State v. Jones*, 188 Ariz. 388, 394, 937 P.2d 310, 316 (1997) (quoting *State v. Tison*, 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981)). The evidence at trial and reasonable inferences therefrom support the conclusion that Clark knowingly and intentionally shot Moritz and knew that he was a police officer when he did so.

¶18 The evidence at trial established that Clark was angry with police officers and fantasized about ways to retaliate or "show them," suggesting a motive for his actions. It also showed that, in driving the pickup truck with its radio blaring, Clark had engaged in behavior that would attract law enforcement to the neighborhood. Clark was playing a "rap CD" at the time that contained "many antisocial attitudes" and included lyrics expressing violent attitudes toward police officers.

¶19 Clark was armed with a .22 caliber handgun with which, according to medical evidence, he shot Moritz from a distance of "at least 2 to 2 and a half feet." The trial court was permitted to infer from Clark's use of the weapon that he intended or knew that he would kill Moritz. *State v. Herrera, Jr.*, 176 Ariz. 21, 30-31, 859 P.2d 131, 140-41 (1993). That inference is further supported by the fact that the bullet that killed Moritz entered his body at the back of his left armpit, which was consistent with Clark having

been "to [Moritz's] left and behind him" when he shot him. This permits the inference that Moritz was attempting to move away from Clark when he was shot.[7]

¶20 One witness testified that she first saw Moritz standing alone outside his vehicle and then saw him at the rear of his police vehicle and "almost immediate[ly]" heard "popping sounds" just before she saw him there. This would have been consistent with Moritz's having tried to take evasive action to avoid being shot. That same witness then saw Moritz go away from his police car, towards the spot where he ultimately collapsed, while a person that appeared to be a male, moving "at a real fast walk or a jog," went in the opposite direction, away from the green truck. Evidence of flight from or concealment of a crime usually constitutes an admission by conduct, and may permit the inference of a consciousness of guilt for the crime charged. *Bible*, 175 Ariz. at 592, 858 P.2d at 1195. All of this is sufficient evidence to support the inference that Clark intentionally or knowingly shot Moritz.[8]

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[7] In this regard, it is also noteworthy that Moritz shot with his left hand.

[8] Clark's theory at trial and on appeal is that Moritz and Clark may have been struggling over Clark's gun when it went off, however there is no evidence of this in the record. Clark bases this argument on the time that elapsed relevant to when Moritz got out of his car, when he was heard to command Clark to stay inside, and when the first gun shots were fired. However the radio transmission evidence shows that thirty seconds elapsed from the

(continued...)

¶21 Furthermore, there is sufficient evidence to support the inference that Clark knew that Moritz was a police officer when he shot him. Moritz was in full uniform and driving a fully equipped patrol car at the time. Witnesses testified that the police car's siren was activated at the stop and the emergency lights engaged. Although, it was early morning, it was already getting light outside. The fact that Clark pulled over in response to the siren and lights also indicates that he realized he was being stopped by a police officer.

¶22 Based on this evidence, we cannot say that the trial court abused its discretion in denying Clark's Rule 20 motion. *Sullivan*, 187 Ariz. at 603, 931 P.2d at 1113.

(2) *Determination that Clark was Not Insane*

¶23 Clark also argues that the trial court abused its discretion when it determined that he did not prove, by clear and convincing evidence, that he was legally insane at the time he shot Moritz. Our review of the record shows that it did not.

¶24 Section 13-502(A) provides that "[a] person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal

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[3](...continued)
time Moritz likely exited his car, after transmitting the license plate number, and radioed that he was "hit." Based on this evidence, Clark's theory that Moritz may have been recklessly shot during a struggle seems speculative at best.

act was wrong." Legal insanity is an affirmative defense that a defendant must prove by clear and convincing evidence. A.R.S. § 13-502(A), (C) (1996).

¶25 We review for abuse of discretion a trial court's finding that a defendant did not prove an insanity defense by clear and convincing evidence. *State v. Zmich*, 160 Ariz. 108, 111, 770 P.2d 776, 779 (1989). We view the evidence in the light most favorable to supporting the trial court's judgment and presume that the judgment is correct if there is any reasonable evidence in the record to sustain it. *State v. Veatch*, 132 Ariz. 394, 396, 646 P.2d 279, 281 (1982). Furthermore, we will not substitute our discretion for that exercised by the trial court. *Id.*

¶26 To prove an insanity defense, a defendant must establish, first, that he was suffering from a mental disease or defect and, second, that the mental disease or defect was of such severity that it rendered him unable to understand the wrongfulness of his conduct. A.R.S. § 13-502(A). Neither party disputed the fact that Clark was suffering from a mental disease, paranoid schizophrenia, at the time of the murder, and that he had suffered from it for quite some time.

¶27 The trial court agreed that Clark had proven that he was "afflicted with a mental disease or defect" at the time of the shooting, but found that he had failed to prove, by clear and convincing evidence, that this disease or defect prevented Clark

from knowing that shooting Moritz was wrong. In reaching its decision, the trial court specified that it had considered "the facts of the crime, the evaluations of the experts, the Defendant's actions and behavior both before and after the shooting and the observations of those that [sic] knew Eric." The trial court was justified in considering all of these factors and the evidence in the record supports its decision.

¶28 Clark's expert witness, Dr. Morenz, concluded that Clark's mental disease rendered him incapable of appreciating that his conduct was wrong. The State's expert, Dr. Moran, concluded that it did not. To the extent that the trial court may have accepted Dr. Moran's evaluation over Dr. Morenz's, it was entirely within the trial court's province to do so. As the trier of fact in this case, it was free to believe or disbelieve the testimony of either expert, *State v. Sanchez*, 117 Ariz. 369, 373, 573 P.2d 60, 64 (1977), and resolve any conflicts in the psychological testimony. *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶29 In reaching its decision that Clark had not proven insanity, it also appears that the trial court gave significant consideration to Clark's own actions both before and after the shooting. For example, its judgment specifically noted Clark's actions in driving through residential neighborhoods with loud music "to attract law enforcement," as well as his behavior in evading capture before his arrest at gunpoint and in disposing of the murder

weapon afterwards. The mode of operation of the mind may be ascertainable from Clark's conduct; therefore Clark's conduct is admissible into evidence as it may indicate sanity or insanity or at least throw light one way or another on the issue. *See State v. Hurles*, 185 Ariz. 199, 205, 914 P.2d 1291, 1297 (1996) (quoting 2 Wigmore on Evidence § 228 (1979)). The trial court in this case correctly considered Clark's pre- and post-crime behavior in concluding that Clark had not proven insanity by a preponderance of the evidence.

¶30 "The rule is not what we would do if we were deciding the case, but whether or not we can say that the trial judge abused [his] discretion in reaching the conclusions [he] did." *Zmich*, 160 Ariz. at 111, 770 P.2d at 779 (citations omitted). Based on the evidence, we find no abuse of discretion in the trial court's determination that Clark did not prove by clear and convincing evidence that he was insane pursuant to A.R.S. § 13-502(A) at the time of the crime.

(3) *Constitutionality of A.R.S. § 13-502(A)*

¶31 At the beginning of the insanity phase of the trial, the trial court asked trial counsel to submit memoranda on the status of Arizona law regarding insanity so that it could "have a clear understanding of your relative positions" before the experts testified. In his memorandum, defense counsel argued that § 13-502(A) was unconstitutional because (1) it did not allow him to

present a "complete defense" under the *M'Naghten*[9] test for insanity to show that he could not appreciate the nature and quality of his acts; (2) it violated his due process by requiring him to prove insanity by clear and convincing evidence; and (3) it shifted the burden of proof to Clark on the specific element of intent.[10] The prosecutor's memorandum focused on our supreme court's decisions in *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997), and *State v. Casey*, 205 Ariz. 359, 71 P.3d 351 (2003), and the fact that "diminished capacity" is not a recognized defense in Arizona. The trial court concluded that it was bound by *Mott*, but nonetheless permitted Clark to present evidence concerning his ability to form the necessary intent to commit the crime.

¶32 At the end of his case, Clark moved again for a directed verdict, relying on his previous Rule 20 arguments "but now in consideration of all the evidence that's been presented." The trial court denied the motion.

¶33 After trial, Clark moved to vacate his conviction, arguing that: (1) the insanity statute violated due process; (2) the court's

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[9] The *M'Naghten* two-prong test for legal insanity provided that a person was not responsible for his criminal conduct by reason of insanity if at the time of the criminal conduct (1) the person was suffering from such a mental disease or defect as not to know the nature and quality of the act, or (2) if such a person did not know that what he was doing was wrong. *See State v. Mott*, 187 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997).

[10] Defense counsel's memorandum noted that because it was preserving these arguments for the record, it did not request the State to respond.

failure to consider whether, due to his illness, he was unable to form the necessary *mens rea* to commit the offense deprived him of his fundamental right to present a defense; and (3) requiring him to prove insanity by clear and convincing evidence violated his due process rights and his right to equal protection.

¶34 He renews these arguments on appeal. We find them to be without merit.

¶35 We review a challenge to a statute's constitutionality *de novo* as a matter of law. *Casey*, 205 Ariz. at 362, ¶ 8, 71 P.3d at 354. "Statutes are presumed constitutional and the burden of proof is on the opponent of a statute to show that it infringes upon a constitutional guarantee or violates a constitutional principle." *Id.* at ¶ 11 (quoting *State v. Wagstaff*, 164 Ariz. 485, 494, 794 P.2d 118, 127 (1990)).

(a) *Due Process Violation*

¶36 Clark argues that A.R.S. § 13-502(A) violates due process because it does not incorporate the first prong of the *M'Naghten* insanity test, which would also permit him to establish that his mental disease or defect was such that it precluded him from knowing "the nature and quality of the act" he committed.

¶37 First, while the due process clause affords an incompetent defendant the right not to be tried, there is no constitutional requirement that a state recognize an insanity defense. *Medina v. California*, 505 U.S. 437, 449 (1992) (citing *Powell v. Texas*, 392

U.S. 514, 536-37 (1968)). Second, consistent with the general rule that both crimes and defenses are matters of state law, the United State's Supreme Court has recognized that individual states are free to recognize and define the insanity defense as they see fit. *Patterson v. New York*, 432 U.S. 197, 201-02 (1977). Clark therefore fails to prove how eliminating the first prong of the *M'Naghten* test establishes a violation of due process under either the Arizona or United States Constitutions.[11]

¶38 Moreover, as the Supreme Court has noted, the *M'Naghten* test for insanity turns on the finding of "criminal irresponsibility" at the time of the criminal offense. *Foucha v. Louisiana*, 504 U.S. 71, 97-99 (1992). It is difficult to imagine that a defendant who did not appreciate the "nature and quality" of the act he committed would reasonably be able to perceive that the act was "wrong." Therefore, we do not find that the language would add significantly to the test available in the statute. *See also State v. Chavez*, 143 Ariz. 238, 239, 693 P.2d 893, 894 (1984) (holding that jury instruction that erroneously omitted the language of the first prong of the *M'Naghten* test was not error because if the jury believed defendant did not know the nature of his acts it could not have found that he did not know their probable results).

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[11] "The federal and state due process clauses contain nearly identical language and protect the same interests." *Casey*, 205 Ariz. at 362, ¶ 11, 71 P.3d at 354.

(b) *Equal Protection Violation*

¶39 Clark also contends that A.R.S. § 13-502(A) violates his equal protection rights by requiring him to prove insanity by "clear and convincing evidence" when other affirmative defenses may be proven by a "preponderance of the evidence." *See* A.R.S. § 13-205(A).[12] This argument fails as well.

¶40 "The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996) (citations omitted). "[I]f a law neither burdens a fundamental right nor targets a suspect class," reviewing courts will uphold the legislative classification as long as it bears a "rational relation to some legitimate [state] end." *Id.*

¶41 As we note above, the statutory provision concerning the insanity defense does not burden a fundamental constitutional right. *Medina*, 505 U.S. at 452-53; *see also State v. Bethel*, 66 P.3d 840, 841-44, 851 (Kan. 2003) (affirmative defense is creature of 19th Century and not so ingrained in legal system as to constitute fundamental principle of law). Nor does Clark establish that

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[12] This section provides: "Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence, including any justification defense under chapter 4 of this title."

defendants who propound an insanity defense are a suspect class. Therefore, Clark is not entitled to a strict scrutiny analysis.

¶42 Because insanity is an affirmative defense rather than an element of the crime, the Legislature may allocate to Clark the burden of proving it. *Cf.* State v. Farley, 199 Ariz. 542, 545, ¶ 14, 19 P.3d 1258, 1261 (App. 2001) (may allocate to defendant the burden of proving justification defense). The state has a rational interest in holding citizens responsible for their criminal conduct. Placing a higher burden on those who claim they are completely not responsible for their criminal conduct is a rational means of accomplishing that end. *See also State v. King*, 158 Ariz. 419, 421, 763 P.2d 239, 241 (1988) (rejecting due process and equal protection challenges to insanity statute).

(c) *Ability to Form Mens Rea*

¶43 Clark argues that the trial court erred in refusing to consider evidence of his mental disease or defect in determining whether he had the requisite *mens rea* to commit first-degree murder. However, the record shows that the trial court did not prevent Clark from presenting such evidence, despite our supreme court's decision to the contrary in *Mott*, even going so far as to permit him to make an offer of proof on the issue at the close of the evidence.[13]

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[13] The *mens rea* requirement for this crime was defined statutorily. A.R.S. § 13-1105(a)(3) ("A person commits first degree murder if . . . intending or knowing that the person's conduct will cause death to a law enforcement officer, the person (continued...)

¶44 Aside from the evidence offered to prove his insanity generally, Clark specified no evidence in his offer of proof that demonstrated he was not capable of knowing he was killing a police officer. Even assuming such evidence was sufficient, the trial court was bound by the supreme court's decision in *Mott*, which held that "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime."[14] 187 Ariz. at 541, 931 P.2d at 1051. Even assuming we agree with the dissent in *Mott*, we do not have the ability to disregard it as the controlling law in Arizona. *State v. Long*, 207 Ariz. 140, 145, ¶ 23, 83 P.3d 618, 623 (App. 2004) ("This court is bound by decisions of the Arizona Supreme Court and has no authority to overturn or refuse to follow its decisions.").

¶45 Clark acknowledges that we are without authority to overrule *Mott*, but nonetheless argues that it was wrongly decided and should be overruled.[15] *See State v. Foster*, 199 Ariz. 39, 41,

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[13](...continued)
causes the death of a law enforcement officer who is in the line of duty.").

[14] *State v. McKeon*, 201 Ariz. 571, 38 P.3d 1236 (App. 2002), on which Clark relies, dealt with the issue of involuntary intoxication from the *non*-abusive use of prescription medications. It also acknowledges that *Mott* still controls on the insanity defense. *Id.* at 575, ¶ 20 n.2, 38 P.3d at 1240 n.2.

[15] He raises the issue for the purpose of preserving it for further appellate review.

¶ 9 n.1, 13 P.3d 781, 783 n.1 (App. 2000). We do not consider those arguments.

(4) Sentence Violates Eighth Amendment

¶46 Finally, Clark maintains that his sentence to life without the possibility of release until he has served a minimum of twenty-five calendar years is disproportionate and violates the Eighth Amendment prohibition against cruel and unusual punishment. We find that it does not.

¶47 We review *de novo* whether a penalty is unconstitutionally disproportionate to the crime. *See, e.g., In re One Residence at 319 E. Fairgrounds Dr.*, 205 Ariz. 403, 409, ¶ 20, 71 P.3d 930, 936 (App. 2003) (reviewing proportionality of punitive forfeiture). The proportionality analysis of a sentence requires us to compare the "gravity of the offense, understood to include not only the injury caused, but also the defendant's culpability, with the harshness of the penalty." *State v. Davolt*, 207 Ariz. 191, 215, ¶ 102, 84 P.3d 456, 480 (2004) (citations and quotations omitted). The mandatory nature of a sentence does not render it disproportionate. *State v. Jonas*, 164 Ariz. 242, 249, 792 P.2d 705, 712 (1990).

¶48 The first step in a proportionality analysis is to determine if an inference of gross disproportionality between Clark's crime and his sentence can be drawn. *State v. Davis*, 206 Ariz. 377, 384, ¶ 35, 79 P.3d 64, 71 (2003). Even given Clark's mental condition, we find in this case that it cannot. A life

sentence with the possibility of release after 25 years is simply not disproportionate to the crime of first degree murder. *See, e.g., Ewing v. California*, 538 U.S. 11, 20-31 (2003) (twenty-five year sentence for stealing golf clubs under "three strikes law" not constitutionally disproportionate sentence).

CONCLUSION

¶49 For the foregoing reasons, we affirm Clark's conviction and sentence.

G. Murray Snow
G. Murray Snow, Judge

CONCURRING:

Patricia K. Norris
Patricia K. Norris, Presiding Judge

Patrick Irvine
Patrick Irvine, Judge

APPENDIX B

Supreme Court

STATE OF ARIZONA

NOEL K. DESSAINT
CLERK OF THE COURT

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1501 WEST WASHINGTON STREET
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KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

May 25, 2005

RE: STATE OF ARIZONA v ERIC MICHAEL CLARK
Arizona Supreme Court No. CR-05-0047-PR
Court of Appeals, Division One, Nos. 1 CA-CR 03-0851 and
1 CA-CR 03-0985 (Consolidated)
Coconino County Superior Court No. CR 2000-0538

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 24, 2005, in regard to the above-referenced cause:

ORDERED: Appellant's Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 25 day of May, 2005.

Noel K Dessaint, Clerk

TO:
Hon Terry Goddard, Arizona Attorney General
Attn: Randall M Howe, Michael O'Toole and Joseph T Maziarz
Goldberg, David Goldberg Attorney At Law
Eric Michael Clark, ADOC #180165, Arizona State Prison, Florence - Eyman Complex-SMU #1 Unit
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Philip G Urry, Clerk, Court of Appeals, Division One, Phoenix

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APPENDIX C

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	1 CA-CR 03-0831 1 CA-CR 03-0995 (Consolidated) DEPARTMENT D
ERIC MICHAEL CLARK, Appellant.	Coconino County Superior Court No. CR 2000-0538 **ORDER**

The court has received Appellant's Motion to Stay Issuance of Mandate Pending Petition for Writ of Certiorari. After consideration,

IT IS ORDERED granting the motion and issuance of the mandate is extended for a period of ninety days from the date of the Arizona Supreme Court denying review (May 25, 2005), in order for Appellant to file a Petition for Writ of Certiorari with the United States Supreme Court.

DATED this 10th day of June, 2005.